No. 3087

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CIRO CONETTO,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error respectfully petitions this Honorable Court for a rehearing of the above entitled cause, and in so doing desires to call the Court's attention to the fact that the opinion affirming the Order of the District Court was rendered on May 6th, 1918, at which time the period within which the plaintiff in error might file a reply brief, pursuant

to an order of this Court made on March 4th, 1918, had not expired.

The opening brief for plaintiff in error was filed on February 14th, 1918. The cause was regularly on the calendar for argument for March 5th, 1918. On March 4th, 1918, the Assistant United States Attorney announced in open Court that no brief had been filed upon behalf of the Government; that she was not ready to argue the case and requested that the case be submitted upon briefs. The Court thereupon made its order submitting the case upon briefs to be thereafter filed, granting the Government thirty days within which to file its brief and the plaintiff in error thirty days thereafter to reply. The Government, upon stipulation and order, secured a thirty day extension of said time and served and filed its brief on May 1st, 1918, leaving the plaintiff in error until June 1st, 1918, within which to file his reply. Notwithstanding this state of the record, the Court, without any intimation to counsel for plaintiff in error, rendered its opinion on May 6th last. This situation rendered the filing of a reply brief a work of supererogation and it has been suggested that a petition for rehearing might be filed rather than to set aside the opinion rendered and permit the filing of a reply brief. We call these facts to the Court's attention because we believe that had the opportunity to file a reply brief been accorded us, the Court would not have been led into the erroneous interpretation of the decisions referred to in the brief for defendant in error.

The removal of plaintiff in error from the Northern District of California to the Southern District of Florida is sought solely upon an indictment charging him and one Alfonzo Conetto with a direct violation of section 29b (1) of the Bankruptcy Act, and plaintiff in error has objected to such removal on the ground that the indictment does not charge the commission of an offense against the United States. To use the language of Circuit Judge Gilbert,

> "the objections to the indictment are, in brief, first, that it does not appear therefrom that the plaintiff in error has ever been adjudged a bankrupt, and that not having been adjudged a bankrupt, he is incapable of committing the offense for which he is indicted, and, second, that it does not appear from the indictment that at any time since the appointment of the trustee the plaintiff in error has concealed from the trustee any of the property belonging to the estate in bankruptcy".

The Court's statement of the grounds of our objections is accurate, but we respectfully submit that neither the "decided weight of authority" nor "the weight of reason" support the Court's answer to these objections.

We believe that it will be conceded that the objections urged against this indictment are not "mere technical defects that might be raised on special demurrer", but that these objections raise the question as to whether or not the indictment states an offense and upon this question we are content to rely upon the authorities cited in our open-

ing brief, pages 9 to 14. The case of *Beavers v. Henkel,* 194 U. S. 73, 83, from which we quoted on page 13 of our opening brief is also cited by the defendant in error on page 2 of its brief, so that there seems to be no difference between the Court and counsel for either side as to the proper rule in this respect.

We therefore address ourselves to a consideration of the points and authorities cited in the opinion of the Court and in the Government's brief, and we respectfully submit that a consideration of those cases will show not only that they are no authority for the Government's contention, but that they absolutely support the position of the plaintiff in error.

PRESENT OR PAST BANKRUPTCY IS AN INDISPENSABLE ELEMENT OF THE OFFENSE DENOUNCED BY SECTION 29b (1) OF THE BANKRUPTCY ACT.

Section 29b (1) of the Bankruptcy Act of 1898 provides that:

> "A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed, *while a bankrupt,* or after *his* discharge, from *his* trustee any of the property belonging to his estate in bankruptcy." (Italics ours.)
>
> (*30 Stat. L., 554.*)

As suggested by the Court, our position is that the *substantive offense* created by this section can

only be committed by the bankrupt. We concede that the *individual members* of a bankrupt partnership or the *officers* of a bankrupt corporation, or any other person, can be guilty of the offense of *conspiring* to violate section 29b (1), or of *aiding and abetting,* under section 332 of the Criminal Code, the commission of said offense, but we insist that, in view of the plain language of the section and in view of all the cases construing this section, no person, *other than the bankrupt himself,* can be guilty of a *direct violation of this section.* As we will hereafter point out, this is the position of all the cases cited not only by plaintiff in error, but by the defendant in error and the Court as well. This would also seem to be the position taken by the United States District Attorney for the Southern District of Florida, who evidently drew the indictment here in question. That official in a very recent communication to counsel for plaintiff in error informs us that a subsequent indictment upon the same facts has been returned against plaintiff in error and his brother charging them with a *"conspiracy to violate the Bankruptcy Act."*

We are also in thorough accord with the statement of the Court that "a partnership is a 'person' under the provisions of Chap. 1, Sec. 1 of the Bankruptcy Act", and it follows, as pointed out in our opening brief, pages 15-20, that the partnership is not only a *person* within the meaning of the Act but that it is a distinct *legal entity* separate and apart from the individuals compos-

ing it. Under the Bankruptcy Act, a partnership is a legal entity the same as a corporation, and the co-partners are different and separate *persons* just as the officers of a corporation are different and separate *persons* from the corporation itself.

The contention of plaintiff in error is very clearly and ably set forth in the case of *Field v. U. S.*, 137 Fed. 6. The opinion in that case was written by Judge Sanborn of the Circuit Court of Appeals for the Eighth Circuit and the case has been cited in most of the decisions construing section 29b, and we therefore quote the case in full:

> "SANBORN, Circuit Judge. The plaintiff in error, who was not a bankrupt but who was a vice president and one of the directors of the Brown-Rollosson Company, a corporation which was a bankrupt, was indicted, a demurrer to the indictment was overruled, and he was convicted under section 29b of the bankruptcy law of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3433), of the offense of having knowingly and fraudulently concealed property which belonged to the estate of the corporation in bankruptcy from its trustee. Section 29b reads:
>
> "'A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy'.
>
> "Neither the offense nor the punishment here described exists under the common law. They are the creatures of the act of Congress. In the absence of that act, no one could be legally

punished by imprisonment for having concealed property from his trustee in bankruptcy. In the presence of the act, therefore, no one can be lawfully punished by imprisonment for this concealment who is not by the terms of the statute subject to this punishment. The act specifically designates the persons liable to the punishment which it prescribes. *They are those who commit the offense denounced while they are bankrupts or after they have received their discharges in bankruptcy.* Under a familiar rule, this specification by the statute of those who are bankrupts, and those who have been bankrupts, as the persons liable to the punishment, *necessarily excludes all others from that liability, and no other person can be lawfully punished under this section for the offense it denounces.* As the plaintiff in error *was not and never had been a bankrupt,* it is difficult to perceive how he could have been guilty of the offense of having concealed *while a bankrupt,* or after *his* discharge, from *his* trustee, any of *his* estate in bankruptcy.

"The argument by which counsel attempt to sustain the indictment and conviction is that clause 19 of section 1 of the bankruptcy law (30 Stat. 544 U. S. Comp. St. 1901, p. 3419) broadens the meaning of section 29b so that it includes the officers of a bankrupt corporation, who conceal the property of its estate in bankruptcy from its trustee, in the class subject to the punishment it prescribes. That clause reads in this way:

> "'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations.

"A careful reading of this clause, however, in connection with the terms of section 29b, convinces that it can have no effect to extend the terms or broaden the true interpretation of the latter subsection. All who are punishable under this subsection 29b are *persons who are or who have been bankrupts.* Hence none of those whom the word 'persons' is made to include, under section 1, cl. 19—no officers, partnerships, women, participants in forbidden acts, agents, officers, or members of any board of directors or trustees—can be guilty of the offense specified in this subsection, unless *they are either bankrupts when they conceal the property,* or have been such and have obtained their discharges before that time. *Present or past bankruptcy is an essential attribute* of *every person who may be an offender under this statute.* Since the plaintiff in error was not a bankrupt when he was charged with concealing the property of the corporation, since he had never been a bankrupt and had not been discharged in bankruptcy, and since he had neither estate in bankruptcy nor trustee therein, he could not have concealed while a bankrupt, or after discharge, any of the property belonging to his estate in bankruptcy, from his trustee, and he was not amenable to the punishment prescribed by subsection 29b.

"The suggestion that concealment by an officer of a bankrupt corporation of the property of its estate in bankruptcy from its trustee is clearly within the mischief of this subsection, and therefore within its true interpretation, is unworthy of serious consideration. A penal statute which creates and denounces a new offense must be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified by such a statute. An act which is not clearly an offense by the express will of the legislative department of the government must not be

made so after its commission by a broad construction adopted by the judiciary. The definition of the offense and the classification of the offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and unambiguous in its terms, the courts may not lawfully extend it, by construction, to a class of persons who are excluded from its effect by its terms, because, in their opinion, the acts of the latter are as mischievous as those of the class whose deeds the statute denounces. U. S. v. Wiltberger, 5 Wheat. 96, 5 L. Ed. 37; U. S. v. Clayton, Fed. Cas. No. 14, 814; In re McDonough (D. C.) 49 Fed. 360; U. S. v. Lake (D. C.) 129 Fed. 499.

"The judgment below must be reversed, and the case must be remanded to the District Court with instructions to sustain the demurrer to the indictment and to discharge the plaintiff in error, and it is so ordered".

The *Field Case* is clearly distinguished in the case of *Cohen et al. v. United States,* (C. C. A.) 157 Fed. 651. In this case the defendants were convicted under section 5440 of the *Revised Statutes of a Conspiracy* to violate section 29b. The Court very clearly distinguished between the offense charged, to wit, a conspiracy to violate section 29b (1), and a direct violation of the section, the Court saying:

"The defendants' first contention is that, as no one of them was the bankrupt, no one of them could have violated this provision of the act, and that, if they could not have committed the principal offense, they could not conspire to commit it. In support of this contention they cite the cases of Field v. United States, 137 Fed. 6, 69 C. C. A. 568, and United States v. Lake, (D. C.) 129 Fed. 499. In the Field

case the Circuit Court of Appeals for the Eighth Circuit held that an officer of a bankrupt corporation was not liable to punishment under section 29b of the bankruptcy law for having fraudulently concealed the property of a corporation from its trustee—*that the present or past bankruptcy of the person accused was an indispensable element of the offense.* In the Lake Case the District Court for the Eastern District of Arkansas held that this section of the bankruptcy act must be strictly construed, and does not include officers of a corporation declared a bankrupt. The defendants also cite United States v. Britton, 108 U. S. 192, 2 Sup. Ct. 525, 27 L. Ed. 703, which held that where an act, if committed, would not amount to a crime under some law of the United States, an agreement to perpetrate it could not be punished under the conspiracy section. We are not called upon to dispute the legal principles laid down in these decisions. The difficulty with them in the present case is that they are not applicable. The *defendants are not charged with concealing assets as officers of a bankrupt corporation.* They are not charged with conspiring that the officers of a bankrupt corporation should conceal its assets. *They are charged with conspiring that a bankrupt corporation should conceal its assets".* (Italics ours.)

In the case of *United States v. Young & Holland Co. et al.,* 170 Fed. 111, the defendants, including a corporation, were indicted under *section 5440 for conspiracy* to violate section 29b c. 4 of the Bankruptcy Act. A careful reading of that case will show that the language quoted from District Judge Brown's opinion (Government's brief, pages 4-5), when read in connection with the en-

tire opinion, does not have the meaning contended for by counsel for the Government. That case was a conspiracy case and the rule laid down in *Cohen v. United States,* supra, is approved and followed. In fact the Court remarks that "the indictment is apparently framed in view of the decision in *Cohen v. United States",* the only defense being that the corporation itself was named as one of the conspirators, whereas in the *Cohen Case* the corporation was not indicted. In view of the facts of that case and the remark of the Court that "the principal argument is directed to the point that a corporation cannot be guilty of the offense created by section 29b," it must be apparent that any remarks of the Court, tending in the slightest degree, to support the Government's contention are mere *dicta,* but as heretofore pointed out the case not only follows the rule laid down in the *Cohen Case,* but even the *dicta* can be construed to mean nothing more than that *persons other than the bankrupt may be charged,* not with the direct violation of section 29b, but only *with conspiracy or with aiding and abetting.*

The next case cited by counsel for the Government and also cited in the opinion of the Court, is the case of *United States v. Freed,* 179 Fed. 237.

This case like the *Holland Case,* supra, was decided in the Circuit Court. An extract from the opinion of District Judge Hand is set forth on page 6 of the Government's brief as follows:

> "The crime of concealing assets could be committed by a corporation, and Freed could be indicted for the offense if he participated in its commission. *Cohen v. U. S.* 157, Fed 651; *U. S. v. Young & Holland Co.,* 170 Fed. 110. Those were cases of conspiracy; but if one may be guilty of conspiring to commit an act, it cannot be that he is not guilty if the conspiracy is accomplished. I do not regard *Field v. U. S.* 137 Fed. 6, as binding after *Cohen v. U. S.* supra".

If the remarks of Judge Hand can be considered as anything but *dicta,* we respectfully submit that they are not in accord with the decisions of the Circuit Court of Appeals referred to therein. It will be noted that in the *Freed Case* the defendants were not charged with conspiracy. The statement that

> "if one may be guilty of conspiring to commit an act, it cannot be that he is not guilty if the conspiracy is accomplished",

is rather indefinite but if this language is to be understood as holding that an officer of a corporation, who can be guilty of a conspiracy to violate section 29b, can be guilty of the direct offense if the conspiracy is accomplished, then we respectfully submit that the same is not in accord with the *Cohen Case,* supra, and the subsequent cases in which it is cited, and this decision of District Judge Hand can have no weight. Furthermore, the remark that the *Field Case,* supra, is not binding, after the *Cohen Case,* supra, is wholly unjustified in view of the language of Circuit Judge Noyes in the *Cohen*

Case, quoted above with reference to the rule laid down in the *Field Case.*

This Honorable Court also cites in its opinion the case of *Roukous v. United States* (C. C. A.) 195 Fed. 353. This case flatly supports the contention of plaintiff in error. The same indictment and question in this case was considered in *United States v. Young & Holland Co. et al.,* 170 Fed. 110, which we have already discussed. As disclosed by that decision the defendants, *including the corporation* were indicted *under section 5440 of the Revised Statutes for conspiracy* to violate section 29b of the Bankruptcy Act. The contention of the defendants was that the corporation could not commit an offense and therefore the defendants could not conspire with the corporation to commit the offense, but the Court held otherwise—that the corporation could commit the offense although

> "the penalty under section 29b of that statute is limited to imprisonment, which, of course, is an impossible penalty as applied to a corporation".

The Court, referring to the *Field Case* and the *Cohen Case,* supra, said:

> "*Field v. United States,* 137 Fed. 6, 69 C. C. A. 568, decided by the Circuit Court of Appeals for the Eighth Circuit, is not in point. *Cohen v. United States,* 157 Fed. 651; 85 C. C. A. 113, decided by the Circuit Court of Appeals for the Second Circuit is otherwise. Indeed, the indictment in the present case seems to have been drawn from what appears in that

> decision almost verbatim. Following our practice with reference to prior decisions by the Circuit Courts of Appeals for other circuits, we yield to the determination in *Cohen v. United States.*"

In the case of *Kaufman v. United States,* (C. C. A.) 212 Fed. 613, the defendant was charged, under section 332 of the Criminal Code, with *having aided and abetted* a bankrupt corporation to conceal assets in violation of section 29b and the Court held, in line with the other cases, that while the defendant, *not being the bankrupt, could not be guilty of the direct offense, he could be guilty under section 332 of the Criminal Code.* In this connection the Court said:

> "It may be conceded that defendant could not be convicted under section 29b of the Bankruptcy Act. That section applies only to one who has 'knowingly or fraudulently concealed while a bankrupt or after his discharge.' *As the defendant is not alleged ever to have been a bankrupt the section is without application to him.* It was held in *Field v. United States,* 137 Fed. 6, 69 C. C. A. 568, that the present or past bankruptcy of the person accused was an indispensable element of the offense created by that section. The defendant, however, is mistaken in supposing that the principle announced in the Field Case is so far applicable to his case as to require this court to set aside his conviction. He loses sight of the fact that *his own conviction is not under section 29b* of the Bankruptcy Act which was under discussion in the Field Case, *but is under section 332 of the Criminal Code".* (Italics ours.)

Counsel for the Government quoted extensively (Government's brief, page 7) from the case of *Wolf v. United States,* 238 Fed. 902.

We respectfully submit that the authorities cited in support of the Court's apparent ruling in that case do not justify the inference which counsel for the defendant in error attempt to draw. It must also be noted that there is no direct statement of the rule, but merely a citation of authorities, apparently in conflict, but, as heretofore pointed out, really not in conflict. Furthermore, the remarks of the Court in this connection were not necessary to the decision, as is evidenced by the concluding sentence of the quotation, to wit.

> "besides, we think the indictments should be sustained under the authorities just cited on the counts charging the defendants with aiding and abetting the concealment of the bankrupt property".

No fault can be found with this statement. It is wholly consistent with the argument advanced by plaintiff in error.

The last case cited (*Wolf v. United States*) as well as the opinion in the case at bar refer to the case of *United States v. Rabinowich,* 238 U. S. 86. In that case three partners, together with certain others, were indicted under section 37 of the criminal code for *conspiracy to violate section 29b* of the Bankruptcy Act. The conspiracy and overt acts were alleged to have taken place more than a year before the finding of the indictment. The

question before the Court was as to whether or not the offense in question was an offense arising under section 29 and therefore governed by section 29d, providing that the indictment must be filed within one year after the commission of the offense, or whether the offense charged was a different offense, under section 37 Criminal Code, and therefore governed by section 1044 of the Revised Statutes as amended (Comp. Stats. 1913 section 1708) providing that the indictment might be filed at any time within three years. The Court held that the crime of conspiracy was a separate and different offense from the offense denounced by section 29b. While there is no direct statement to that effect, we respectfully submit that the language of the Court strongly intimates that the rule contended for by plaintiff in error is correct and the Court cites the *Field Case,* supra, and the entire trend of the decision holding that conspiracy is a different offense from the direct violation of section 29b is in perfect accord with our contention in the case at bar. Mr. Justice Pitney, in delivering the opinion of the Court, plainly intimates that, in view of the *Field Case,* supra, there is no doubt but that "present or past bankruptcy is an attribute of every person who may commit the offense" denounced by section 29b of the Bankruptcy Act, and we quote the following from the opinion of the Court:

> "It is at least doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee, as defined in sec-

> tion 29b (1) of the bankruptcy act, can be perpetrated by any other than a bankrupt or one who has received a discharge as such. Counsel for defendant in error refers to section 1, subdivision 19, of the act, which gives the following definition: "(19) 'Persons' (87) shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations". But the circuit court of appeals for the eighth circuit has held that this does not broaden the interpretation of section 29b (1) and that *present or past bankruptcy is an attribute of every person who may commit the offense therein denounced.* Field v. United States, 69 C. C. A. 568, 137 Fed. 6. And see Kaufman v. United States, 129 C. C. A. 149, 212 Fed. 613, 617.
>
> But, *if* there be doubt about this we are not now called upon to solve it". (Italics ours.)

It is obvious that if the rule laid down in the *Field Case* clearly states the law, then the contention of plaintiff in error must be sustained. Furthermore, it must be apparent that those cases, in so far as they even intimate that persons, other than the bankrupt, can be guilty of a direct violation of 29b of the Bankruptcy Act are founded upon the erroneous conclusion that the *Cohen Case* overrules the *Field Case.* But *nowhere* can there be found any direct statement of such a holding aside from the remark of Judge Hand in the case of *United States v. Freed,* 179 Fed. 236, and in

view of the numerous decisions of the Circuit Court of Appeals above cited and of the statement of Mr. Justice Pitney in the case of *United States v. Rabinowich,* supra, that "*if* there be doubt about this", there can be no doubt but that the contention of plaintiff in error must be sustained.

THE INDICTMENT DOES NOT CHARGE A CONCEALMENT FROM THE TRUSTEE.

The direct allegation of the indictment is that the concealment took place before the appointment of the trustee. As stated in the *Field Case* the section in question clearly states that the property must be concealed from the trustee in bankruptcy. There might be a conspiracy to conceal property from the trustee in bankruptcy, and the overt act constituting the concealment might take place before the appointment of the trustee, but in an indictment charging a direct violation of section 29b, it must be directly alleged that the property was concealed from the trustee. The language used in this indictment is, "that *before* the appointment and qualification of said Maxwell Baxter as trustee * * * the said Ciro Conetto and Alfonzo Conetto unlawfully and fraudulently did conceal" certain property. There is no allegation that the defendants *continued to conceal* said property or that they ever *concealed said property from said trustee.* The allegations of the indictment, that

> "after the qualification of said Maxwell Baxter as trustee * * * the said Ciro Conetto and Alfonzo Conetto have not, nor has either of

> them disclosed to the said Maxwell Baxter the possession by them * * * of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter, trustee as aforesaid, the said merchandise * * * or accounted to him for the same * * * and that no accounting has up to this date been made to the said Maxwell Baxter",

are clearly insufficient to charge a concealment from the trustee. Counsel for defendant in error concede that "more apt language may have been found to express a continuing concealment" (Government's brief, p. 8) and this Honorable Court in its opinion says,

> "that although concealment began before the appointment of the trustee and *was therefore at that time no offense,* it continued after the appointment of the trustee". (Italics ours.)

We submit that there is nothing in the indictment to support the conclusion that the concealment "continued after the appointment of the trustee" nor is there anything in the indictment to sustain the conclusion that

> "the concealment is alleged to have consisted in the failure of the accused to deliver the property to the trustee, or to account for the same, or to disclose their possession thereof, and thereby concealment from the trustee was charged."

In fact there is no direct averment in the indictment that the property was ever in the *possession of the defendants* at any time *after the appointment of the trustee,* the specific allegation being

that the property was concealed *before* the appointment of the trustee.

The Court in its opinion herein cites the case of *Warren v. United States* (C. C. A.) 199 Fed. 753, and we believe that the opinion in that case conclusively establishes the contention of plaintiff in error here. In that case the defendant was adjudged a bankrupt on November 18th, 1908. On December 9th, 1908, a trustee was appointed and qualified. The indictment was found December 18th, 1909, more than twelve months after the filing of the petition and schedules and the adjudication, and more than twelve months after the appointment of the trustee. The indictment alleged that the defendant "on or about the 10th day of January, 1909, and continuously thereafter * * * knowingly, unlawfully and fraudulently concealed" from the trustee certain assets. The evidence showed that the *acts of concealment* took place more than twelve months prior to the filing of the indictment and the defendant claimed that the prosecution was barred by section 29d of the Bankruptcy Act which provides that the indictment must be filed within one year after the commission of the offense. The Government contended that as long as the bankrupt "fails to notify the trustee of the whereabouts of the property, the concealment continues, and there is no statute of limitations to prevent the prosecution". In other words, that the "mere silence and passivity of the defendant after the alleged concealment makes the

crime a continuing one". But the Court held otherwise and we submit that in the case at bar the language of the indictment does no more than to allege a "mere silence and passivity" on the part of the defendants, and that in view of the Court's opinion in the *Warren Case* the indictment is insufficient because it fails to allege *a concealment from the trustee.*

Counsel for the Government in their brief cite no cases upon this point but this Honorable Court in its opinion, in addition to the *Warren Case,* supra, also cites the case of *Kaufman v. United States,* 212 Fed. 613 and the case of *Cohen v. United States* 157 Fed 651.

In the *Kaufman Case,* supra, the indictment charged the Daisy Shirt Company with having *concealed its assets from its duly qualified trustee in bankruptcy,* and further charged that the defendant,

> "under the circumstances aforesaid did knowingly and fraudulently cause, procure, aid and abet the Daisy Shirt Company * * * to conceal * * * from William P. Myhan, the duly qualified trustee in bankruptcy of the said Daisy Shirt Company, the aforesaid sums of money and the aforesaid property".

This language clearly alleges that the property was *concealed from the trustee,* not that there was a mere passive failure to disclose property, but that there was an active and positive *concealment from the trustee* which is not true in the case at bar. In this behalf Circuit Judge Rogers said:

> "The offense with which the defendant is charged is that he *aided and abetted* the Daisy Shirt Company *while the said company was a bankrupt* knowingly and fraudulently *to conceal from the duly qualified trustee* property belonging to the estate in bankruptcy. *The concealment must be a concealment from the trustee.* In re Adams (D. C.) 171 Fed. 599. In the case at bar the funds were taken and the concealment began before the appointment of the trustee. But if the concealment which began before the appointment of the trustee continued after the appointment was made, and there was evidence in this case showing that it did, it constituted concealment from him. This we decided in the Cohen Case, supra". (Italics ours.)

The last case cited by the Court is the case of *Cohen v. United States,* 157 Fed. 651. The indictment in that case alleged a conspiracy to violate section 29b and we submit that the indictment in that case is no precedent for the Court's ruling in the case at bar, as must be evident from the following quotation from the Court's opinion:

> "It is true that it charges the removal and concealment of certain property before the appointment of a trustee; but it further alleges that a trustee was subsequently appointed, and that the property was never turned over to him, but *was concealed from him* by the procurement of defendant Simpson with the knowledge, consent, and connivance of the other conspirators. The case presented by the indictment is therefore one of continued concealment, and we are not called upon to consider whether there is an omission in the bankruptcy law in respect of the disposition of property in contemplation of bankruptcy. If a

> bankrupt conceal his property before the appointment of a trustee and continue to conceal it after the appointment, he violates the bankruptcy act, and a conspiracy that he shall do so violates the conspiracy statute". (Italics ours.)

In preparing this petition we have referred to and analyzed every case cited by counsel for the defendant in error in their brief and every case cited in the opinion of this Honorable Court in its opinion, and we earnestly believe that each and every authority, with the possible exception of the *dicta* of District Judge Hand in the *Freed Case,* supports the position of plaintiff in error that the indictment herein is fatally defective for the reasons above set forth, to wit, that the plaintiff in error is not alleged to have been *adjudged a bankrupt* and therefore could not be guilty of the direct offense named in section 29b of the Bankruptcy Act, and, second because it is not alleged that the property referred to in the indictment was ever *concealed from the trustee.* And even the one apparent dissent (the *Freed Case*) attempting to set aside the rule of the Circuit Court of Appeals in the *Field Case* is nullified by subsequent decisions of the Circuit Court of Appeals and particularly by the reference to the *Field Case* in the opinion of Mr. Justice Pitney in the case of *United States v. Rabinowich.* The cases herein quoted clearly point out that the proper procedure in such a case as the one at bar is to charge the defendant either with *conspiracy under section 37* of the Criminal Code,

or *with aiding or abetting under section 332* of the Criminal Code, and that no person, *other than the bankrupt,* can be charged directly under section 29b.

It is respectfully submitted that the opinion of this Honorable Court, is in conflict with the authorities construing this section, and we earnestly pray that a rehearing may be granted and the judgment reversed.

Dated, San Francisco,
June 3, 1918.

NATHAN C. COGHLAN,
Attorney for Plaintiff in Error and Petitioner.

HYMAN LEVIN,
of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
June 3, 1918.

NATHAN C. COGHLAN,
Counsel for Plaintiff in Error and Petitioner.